



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

November 25, 1996

Mr. David Anderson  
Chief Counsel  
Office of Legal Services  
Texas Education Agency  
1701 North Congress Avenue  
Austin, Texas 78701-1494

OR96-2221

Dear Mr. Anderson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 35654

The Texas Education Agency (the "agency") received a request for "information provided to the [agency] by [a list of nine] driving schools relating to the number of teenagers graduated from the respective schools for the fiscal year 1994 and for any completed quarters for the fiscal year 1995." The requestor asks that "the information be provided in the same manner the information was received by the [agency] from each school (i.e., quarterly; semi-annually)." You do not raise any exceptions to release of the requested information but assert that its release may implicate third party privacy interests of these driving schools and raise section 552.305 of the Government Code on their behalf.

On September 8, 1995, pursuant to section 552.305 of the Government Code, this office notified the driving schools whose proprietary interests may be affected by release of the requested information and provided them with an opportunity to submit in writing to this office their reasons why the information should be withheld or released. Each of these driving schools responded to our notification by asserting that the requested information contains trade secrets or confidential commercial information excepted from public disclosure under section 552.110 of the Government Code.<sup>1</sup>

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<sup>1</sup>On behalf of four of the driving schools, Mr. Ginsberg also raised section 552.104 of the Government Code. However, the purpose of this exception is to protect the interests of a governmental body in competitive bidding situations. See Open Records Decision No. 592 (1991). Section 552.104 is not designed to protect the interests of private parties that submit information to a governmental body. *Id.* at 8-9. As the agency did not raise section 552.104, we do not address this exception.

Section 552.110 excepts from disclosure trade secrets and commercial or financial information obtained from a person and confidential by statute or judicial decision. Section 552.110 is divided into two parts: (1) trade secrets and (2) commercial or financial information, and each part must be considered separately.

The Texas Supreme Court has adopted the definition of "trade secret" from the Restatement of Torts, section 757, which holds a "trade secret" to be:

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to a single or ephemeral event in the conduct of the business. . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

Restatement of Torts § 757 cmt. b (1939); see *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), cert. denied, 358 U.S. 898 (1958).

The following criteria determine whether information constitutes a trade secret:

(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS, *supra*; see also Open Records Decision Nos. 319 (1982) at 2, 306 (1982) at 2, 255 (1980) at 2.

When a governmental body takes no position with regard to the application of the "trade secrets" branch of section 552.110 to requested information, we accept a private person's claim for exception as valid under that branch if that person establishes a prima facie case for exception and no one submits an argument that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5. We have considered each school's arguments with regard to the information each seeks to withhold as trade secret information under

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section 552.110. We conclude that none of the schools has made a prima facie case that the information at issue is protected under the trade secret prong of section 552.110. *See* Open Records Decision No. 363 (1983) (third party duty to establish how and why exception protects particular information). Therefore, the agency may not withhold this information as a "trade secret" under section 552.110.

Several schools also argue that the information contains confidential commercial or financial information. In Open Records Decision No. 639 (1996), this office established that it would follow the test articulated in *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) for judging the confidentiality of "commercial or financial information," which treats such information as confidential

if disclosure of the information is likely . . . either . . . (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.

498 F. 2d at 770 (footnote omitted). "To prove substantial competitive harm, the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure." *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir.), *cert. denied*, 471 U.S. 1137 (1985) (footnotes omitted); Open Records Decision No. 639 (1996) at 4. To be held confidential under *National Parks & Conservation Ass'n*, information must be commercial or financial, obtained from a person, and privileged or confidential. *National Parks & Conservation Ass'n*, 498 F.2d at 766. In the case at hand, we find that none of the driving schools has made a specific showing that it actually faces competition or that substantial competitive injury would likely result from disclosure of this information. We conclude that the agency may not withhold the requested information under the second prong of section 552.110 of the Government Code.

In summary, you must release the requested information to the requestor. We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read "Todd Reese", with a long horizontal flourish extending to the right.

Todd Reese  
Assistant Attorney General  
Open Records Division

RTR/rho

Ref.: ID# 35654

Enclosure: Submitted document

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